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No. 85-1176

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

MORRIS I. COHEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Petitioner takes exception to respondent's allegation that he was not engaged in the practice of law for profit. It is submitted that petitioner spent 4 years in law school at an estimated cost of $40,000.00 to obtain a degree and to pass the Indiana State Bar examination on the first try. By the Regulations of the Internal Revenue Service

petitioner was not engaged or spent funds for a hobby as described in the regulations. Petitioner did not ever refuse to receive payment and was ready willing and able to engage in the practice of law for profit. Petitioner reported a $5,000.00 adjusted gross income tax on his 1967 tax return and subsequently earned fees on later on other cases. Petitioner notes that the Court not once asked him if he received payment for his services. The Court acknowledged that petitioner was precluded from advertising at this time because of the ban on advertising by members of the bar.

Respondent erred in stating that there was a post trial stipulation atp. 3 in respondent's memorandum as a note. Petitioner did not ever sign or agree to a post trial stipulation as stated in the aforementioned note. There was no contact by any of the parties after the trial. In fact the last communication petitioner received was an exact duplicate of the pre-trial stipulation (Pet. B-1 and B-2) and the computation at (pet. B-3 and B-4) showing a credit of $20,557.00. The foregoing was subsequently

amended (Pet. C-3) as a deficiency of $1149.00 with no reason being given for the amended computation and within 5 days after the original pre-trial stipulation. At no time after the the trial was petitioner asked to sign any stipulation after the trial and must be a figment of respondent's imagiration that he was a party to a post trial stipulation. In addition petitioner was not given the opportunity to object to the new computation showing a deficiciency of $1149.00 as required by Tax Court Rule 155. Pet. F-1)

The definition per se of a stipulation of the parties is both parties are required to agree and sign the stipulation. (Pet. D-1) Respondent uses as his authority for the post-trial stipulation (Pet. App. A3). The petitioner was not even granted a hearing by the Appellate Court and was not in any courtroom or confrontation with respondent's attorneys subsequent to the lower court trial. There is nothing in the docket sheet of the lower

court which indicates that a post-trial stipulation was entered into by the parties. Petitioner submits furthermore that the argument of respondent is not valid as to the profit motive. If petitioner had engaged in some other activity there might be a valid argument that there was not a profit motive by petitioner, but the mere fact that petitioner had accepted fees in the practice of law is in itself sufficient to /negate the non-profit motive. Furthermore any one who practices law without a license in the State of Indiana is subject to criminal prosecution. Petitioner expended over $40,00.00 to go to law school for 4 years and it was not a picnic as any one who has ever attended law school would attest to. That in itself is sufficient to establish a profit motive. Respondent is equating bad luck to a no-profit motive. Many corporations go three years without earning a profit, but that is no sufficient reason for saying that they have no profit motive. Petitioner did pay taxes as an attorney in 1967 when he had a profit of over $5,000.00. The raison de etre for going to law school in

petitioner's circumstances was to earn a livlihood. A promise that he would be granted employment after petitioner passed the Indiana Bar was not fulfilled and petitioner was left on his own. The lower court makes the observation that petitioner was not allowed to advertise. Th description the lower court (U.S. Tax Court) makes of the typical lawyer is nothing but an ambulance chaser and there is not much "hanging around by the lawyer." Syllogistic reasoning would indicate that as a major premise petitioner went to law school and passed the bar so that he could practice law: a minor premise that he did practice law: and the conclusion that he was therefore in the practice law to earn a livlihood. (Profit motive)

Petitioner submits that he was denied due process of law when the United States Tax Court had outside input into its decision. At (Pet. A-1 d) a reference is made to the telephone directory. Petitioner did not or was not allowed to present this in his testimony. In addition the Court at the same place made reference to the Yellow Pages of the telephone directory whic was not

even mentioned at the trial and must have been supplied by an outside person. The reference was to the fact that petitioner was listed in the white pages of the directory and not in the Yellow Pages. The Tax Court in its Opinion (P A-1 i' that petitioner testified that he had a brother in California whom he went to visit which is a falsehood. Petitioner never had a brother who resided in California. He has three brothers: one has lived in Chicago for the last 20 years, one has lived in Gary Indiana and its environs for over thirty years and the other brother has lived in Indianapolis all of his life. Petitioner has reason to believe that this was injected into the opinion to give him "needles" as it said in the vernacular and had reference to the fact that his brother who is a lawyer reneged on his offer to employ petitioner. The reason for the delay of submitting an opinion for over 15 months is indicative of the attitude of the Tax Court. Interest on the deficiency was accumulating at over13 % interest.

Respondent does not respond to petitioner's allegation that forms 2440 (certificate of exemption for physical disablity) were removed from the three files (1978, 1979 and 1980 and was the basis on which the original assessment was made. The three years would have amounted to $15,600.00 (3 times $5200)

Respondent has tried to obfuscate the foregoing removal of an integral part of his tax returns, but the salient fact remains that that the parties signed a pre-trial stipulation providing for inviolability of the disability exclusion pursuant to 105(d) of the Internal Revenue Code of 1954 and then respondent's attorneys reneged on the only stipulation in the case.

Having been an enforcement agent for the Wage & Hour Division of the United States Department of Labor for over 21 years petitioner is outraged that:

1. The deficiency was based on a stripped file and assessed therefor;

2. The assessment was unsigned

contrary to the Internal Revenue Code. (Sudden thought--what would happen if a taxpayer did not sign his tax return?)

3. Petitioner was not given a chance to rebut the deficiency contrary to due process of law as delineated by the due process clause of the Fifth Amendment of the United States Constitution.

Any of the foregoing 3 examples would have prejudiced the case by the Wage & Hour Division.

The United States Tax Court Rules are patterned after the United States District Court Rules. There is no provision in the rules for a change of judge. Judge Thornburgh, Jr., had the case for six months and then Judge Drennen took over. This is a denial of procedural due process and indicates a major deviation from the rules, and remphasizes the fact that petitioner was not given a "fair shake".

No mention is made of the fact that petitioner had alleged that his sister played an active part in the scenario.

Petitioner respectfully submits that his

petition for writ of certiorari be granted.

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